

Redacted Version of Document Sought to Be Sealed

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23 individually and on behalf of all similarly
23 situated,

24 Plaintiffs,
25
26 vs.
27 GOOGLE LLC,
28 Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' RESPONSE TO
GOOGLE'S SUBMISSION RE:
PRIVILEGE RE-REVIEW (DKT. 566)**

The Honorable Susan van Keulen

1 Plaintiffs respectfully respond to Google's April 29 submission (Dkt. 566) regarding
 2 Google's Court-ordered re-review of 1,000 privilege log entries where (i) the document was
 3 designated as privileged in the text, but no attorney was identified on Google's privilege log; and
 4 (ii) emails where an attorney is in the to, cc, or bcc line but does not respond (Dkt. 542).

5 Plaintiffs now ask that the Court order Google to re-review all additional entries in these
 6 two categories. This re-review by Google is warranted based on (1) Google's **37% error rate** with
 7 those 1,000 entries (with Google changing its designations for 371 documents) and (2) the high
 8 likelihood that Google's re-review of the additional entries will similarly yield production of
 9 relevant, non-privileged documents that Google improperly withheld.

10 Google's error rate is alarmingly high, which in itself warrants additional review. Google
 11 "chang[ed] its privilege designation" for 371 out of the 1,000 documents. Dkt. 566 at 1. Google's
 12 37% error rate for this set of 1,000 entries is even more concerning than, in this Court's own words,
 13 the "significant correction rate of 25%" for the first 830 documents that Google re-reviewed. Dkt.
 14 522 at 1-2. Google's earlier 25% error rate, for an even smaller set, "g[ave] the Court pause" and
 15 led the Court to conclude that "[s]ome form of reassessment of privilege assertions is warranted."
 16 Dkt. 522 at 2. Google's subsequent 37% error rate, for an even larger set (which Google
 17 characterizes as a "random sample" but "not a representative sample"), shows that further review
 18 is necessary. Even Google's initial re-review proposal admitted that an error rate of over 10%
 19 warrants additional review. *See* Dkt. 533 (Google submission stating: "If the error rate for these
 20 500 documents is over 10%, Google will re-review an additional random sample of 500 documents
 21 from the same two categories described above.").

22 Additional review by Google is also warranted given that these Google errors resulted in
 23 Google improperly withholding key documents. Google notes that some of these documents were
 24 duplicates (116 out of the 371, according to Google), but Google's April 29 production of
 25 previously withheld documents contained a treasure trove of unique, key documents (or portions
 26 thereof) that Google would have continued withholding but for this Court's re-review Order. For
 27 example:

28

1 • **GOOG-BRWN-00848723:** [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 • **GOOG-BRWN-00853326:** [REDACTED]

7 [REDACTED]

8 • **GOOG-BRWN-00850441:** [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 • **GOOG-CABR-04780837.R:** [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 • **GOOG-CABR-05888096:** [REDACTED]

16 [REDACTED]

17 • **GOOG-BRWN-00848778:** [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 • **GOOG-BRWN-00854174:** [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 • **GOOG-CABR-05886497:** [REDACTED]

24 [REDACTED]

25 • **GOOG-CABR-05894563:** [REDACTED]

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27 ¹ Google previously produced a version of this document where the language quoted here was cut-off, and only visible within the document's metadata. See GOOG-BRWN-00157001. By contrast, 28 the withheld version, produced on April 29, 2022, contained this quote in the document itself.

At best, Google's privilege review has been woefully inadequate. Whether these designations were mistakes or intentional, the existence of Google's internal "Communicate with Care" practice raises serious concerns regarding the manner in which documents were created and then reviewed for production. *See, e.g., United States v. Google, LLC*, Case No. 1:20-cv-03010-APM, at Dkt. 326-1 (Mar. 21, 2022, D.D.C.). Google has now re-reviewed almost 2,000 entries from its privilege log and changed its privilege designation for roughly 31% of them. This means that many key documents, like the ones above, are being withheld improperly. Google's April 29 submission does not argue that it would be burdensome to undertake an additional re-review, nor does Google provide any information about how many documents fall into the two categories at issue that would need to be re-reviewed. Whatever the number is, given the circumstances, this is not an undue burden and is proportional to the needs of this case.

For these reasons, Plaintiffs respectfully submit that the Court order Google to re-review all documents on its privilege log where (i) the document was designated as privileged in the document's text, but no attorney was identified on Google's privilege log; and (ii) emails where an attorney is in the to, cc, or bcc line but does not respond. Plaintiffs are continuing to evaluate any additional relief that they may seek in terms of these improperly withheld documents, including for example limited additional deposition testimony.

Dated: May 9, 2022

Respectfully submitted,

By: /s/Amanda Bonn

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